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In the Supreme Court of the United States

No. 444.

OCTOBER TERM, 1963.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

KOHN, INC., THE KOHN BREWERY CO., PAULINE KOHN, ADAM J. KOHN, STEPHEN ZARICH and PETER ZARICH,

Respondents.

ACE BEER DISTRIBUTORS, INC.,

Petitioner,

vs.

THE STROH BREWERY COMPANY and MORTON R. ENGEL,

Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

This Reply Brief is filed in reply to the two Briefs in Opposition filed by the respective Respondents herein.

Respondents attempt to defend the summary rulings by the courts below on motions for judgment on the pleadings. Since these rulings conflict with the substantive holdings of *Klor's, Inc.*, 359 U. S. 207 (1959) and *Poller*, 368 U. S. 464 (1962) and with the procedural holdings of *Poller* and *White Motor*, 372 U. S. 253 (1963), Respondents find themselves driven to untenable premises.

1. Upon motions for judgment on the pleadings, Respondents are forced to deny and read restrictively the allegations of the Complaint in order to argue that Petitioner was not, as alleged, a "competitor", entitled to the protection of the anti-trust laws. Respondents prefer to read the Complaint as alleging "business death by natural causes" rather than, as alleged, "business death by conspiracy to eliminate a competitor".

2. Having "denied" Petitioner the status of a competitor in commerce, Respondents then make further denial of the allegations of the Complaint by arguing that the anti-trust laws are inapplicable to a "mere shift" of a distributorship in a single product in a given market.

Respondents merely reflect the course of decision in the courts below. The rulings of these courts also necessarily proceeded from the denial of the allegations of the Complaint.

I.

THE EXERCISE BY THE COURT OF ITS POWER OF SUPERVISION IS REQUIRED TO CORRECT THE RESTRICTIVE READING OF THE ALLEGATIONS OF THE COMPLAINT BY WHICH PETITIONER HAS BEEN EXCLUDED FROM PROVING THAT IT WAS BOTH AN ACTUAL COMPETITOR AND A PROSPECTIVE COMPETITOR OF RESPONDENTS IN COMMERCE, AND THE EFFECT ON COMMERCE OF THE CONSPIRACY ALLEGED.

The Brief of Respondents, The Stroh Brewery Company and Morton R. Engel ("Stroh Brief"), and the Brief of the Respondents Kohn, Inc., et al. ("Kohn Brief"), both take considerable pains to "fraction off" the propositions of which ample notice is given by the Complaint.

Paragraph 13 of the Complaint (R. 8a) alleges that the purpose of Respondents' conspiracy was "*to eliminate*

plaintiff as a beer distributor in interstate commerce and thereby to suppress prospective competition in commerce with the said Kohn, Inc. in the sale of Stroh's beer." Paragraph 17 of the Complaint states: (R. 10a)

"Plaintiff says that the defendants have substantially destroyed plaintiff's business, organization and good will and have substantially destroyed plaintiff as a beer distributor in interstate commerce * * *"

From the allegations of its Complaint, and within the fair scope and intendment thereof, Petitioner is prepared to prove, that:

1. Petitioner intended to distribute and had the prospect of distributing beer in interstate commerce.
2. Petitioner and the new distributor, Kohn, Inc., were competitors in the distribution of Stroh's beer.
3. Petitioner intended to compete with Kohn, Inc., the new Stroh distributor, in the distribution of other beers.
4. Petitioner's business was not limited to the exclusive distributorship of a single product, but had the capability of distributing other malt beverages in commerce.
5. Respondents' conspiracy destroyed Petitioner's competitive capacity, *to the advantage of Stroh's, and to the disadvantage of the free flow of other products in commerce, in that Stroh's destruction of Petitioner foreclosed competing breweries from utilizing Petitioner's facilities in the distribution of such other beers.*
6. The impeding of commerce and the elimination of competition was the objective sought by Stroh.

This Court has repeatedly held that the diversion by conspiracy of the free flow of commerce to local marketing areas is a wrongful interference with commerce. U. S. vs.

Crescent Amusement Co., 323 U. S. 173 (1944); *Schine Chains Theaters, Inc. vs. U. S.*, 334 U. S. 110 (1948); *U. S. vs. Griffith*, 334 U. S. 100 (1948); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959).

Despite the obvious intendment of the scope of Petitioner's Complaint, the Stroh Brief (Page 4 to 5) erroneously urges that:

> a. The Complaint does not allege that after the substitution of distributors, Petitioner ever distributed "or intended to distribute, or had any prospect of distributing" beer in interstate or intrastate commerce;
>
> b. The Complaint does not allege that Petitioner and the new distributor were competitors in the distribution of Stroh beer;
>
> c. The Complaint does not allege that Petitioner and the new distributor were competitors in the distribution of any other beer;
>
> d. The Complaint does not allege that Petitioner was or had any intention of becoming, or had any prospect of becoming, in any way a competitor of Respondents or of the new distributor.

The Kohn Brief engages in a similar unwarranted restrictive reading of the Complaint. However, the Kohn Brief fails to agree with the Stroh Brief on *how* restrictively the Complaint should be read. The Kohn Brief complains only that "the complaint * * * does not allege either the existence of any competition between the parties or the suppression of any competition, or any effect upon competition in the market * * *." (Kohn Brief at 4.)

It would seem obvious that the Respondents have engaged in a wholly impermissible denial of the allegations of the Complaint as well as a failure to give it the construction most favorable to the pleader. *Only by denying the allegations that Petitioner was a competitor in commerce*

may Respondents justify the granting of motions for judgment on the pleadings by the courts below. Only from such a premise can Respondents then deduce the conclusion that the Complaint can neither allege any impact upon competition nor furnish an evidentiary basis concerning the effect on commerce or in the market of the conspiracy alleged.

The settled rules of federal procedure demonstrate the impropriety of Respondents' premise—the premise on which the courts below made summary disposition of this litigation. The legal principles controlling a motion for judgment on the pleadings are set forth in *Barron and Holtzoff, Federal Practice and Procedure*, Vol 1, section 359, page 673 as follows:

> "The policy of the courts is to dispose of law suits on their merits whenever possible rather than on motions for judgments on pleadings. Such a motion is proper only *if no material issue of fact is presented by the pleadings* * * *." (Emphasis supplied.)

Accord: Roemhild vs. Jones, 239 F. 2d. 492 (8th Cir., 1957); 5 *Cyc. Federal Proc.*, § 15.225.

By urging upon this Court the premises arising from the denial of the allegations of the Complaint, Respondents underscore both the error in the courts below and the necessity for supervision by this Court.

Both courts below made a wholly unfounded assumption of fact in granting judgment against Petitioner. They *assumed*, despite the clear allegations of the Complaint, that the Complaint alleged a mere substitution of a single product distributor, *not* the destruction by conspiracy of a merchandising competitor. The courts below *assumed*, again contrary to the pleadings, that no market impact would result from the refusal to deal "without more." Hence both courts ignored the achievement, by a wrongful

combination, of the destruction of a competitor and the resulting diversion of the free flow of commerce in a market.

The courts below further violated the well-settled rules announced by this Court for the construction of antitrust complaints. As the Court of Appeals for the Ninth Circuit held recently in *Walker Distributing Co. vs. Lucky Lager Brewing Co.*, 1963 Trade Cases, Par. 70,886:

> "In several cases, the Supreme Court has indicated that we should be liberal in construing antitrust complaints. (See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 1961 (1961 Trade Cases Par. 69,896), 364 U. S. 656, 659-60 (per curiam); *Radovich v. National Football League*, 1957 (1957 Trade Cases Par. 68,628), 352 U. S. 445, 453-54; *United States v. Employing Plasterers Ass'n*, 1954 (1954 Trade Cases Par. 67,692), 347 U. S. 186, 188-89). In the *Employing Plasterers* case, the Court made it clear that, 'whether these charges be called "allegations of fact" or "mere conclusions of law", * * * they must be taken into account in deciding' whether a claim for relief is stated. (Id. at 188)."

The courts below have departed from the course of decision plainly marked out by this Court.

II

BY THE DENIAL OF PETITIONER'S STATUS AS A COMPETITOR IN COMMERCE, THE COURTS BELOW, IN CONFLICT WITH THE RULINGS OF OTHER CIRCUITS, SEEK TO DEPRIVE PETITIONER OF THE PROTECTION AFFORDED BY THE ANTI-TRUST LAWS FROM CONSPIRACIES AND COMBINATIONS DESIGNED TO PROTECT THE RIGHT OF A COMPETITOR TO ENGAGE IN COMMERCE.

Following the lead of the Courts below, Respondents proceed to "pitch" their briefs upon the two erroneous premises derived from the denial of the allegations of the Complaint:

1. Petitioner, as a single product distributor, is not a competitor; and
2. The conspiracy alleged can have no effect either upon competition in the market or upon market conditions.

With these premises, Respondents find no difficulty in distinguishing from the result in the case at bar the patently conflicting rulings of the Courts of Appeals for the First, Second and Ninth Circuits. Indeed, Respondents would equally find no difficulty in eliminating the many cases that accord to the prospective competitor, the protection of the anti-trust laws against conspiracies designed to inhibit his entry into commerce, e.g., *Gamco, Inc. vs. Providence Fruit and Building, Inc.*, 194 F. 2d. 484 (C. A. 1, 1962); *Vines vs. General Outdoor Advertising Co.*, 171 F. 2d. 487 (C. A. 2, 1948); *Triangle Conduit & Cable Co., Inc. vs. National Electric Products Corporation*, 152 F. 2d. 398 (C. A. 3, 1945).

In line with the clear implication of the rulings from the First, Second, and Ninth Circuits relied upon by petitioner, it is the common understanding of the federal courts that even a conspiratorial destruction of an *in-*

tended business is actionable. The same doctrine applies *a fortiori* to an *established one*. In *Delaware Valley Mar., Sup. Co. v. American Tobacco Co.*, 184 F. Supp. 440 at 443 (E. D. Pa., 1960), the Court held:

> "Section 4 of the Clayton Act authorizes the recovery of treble damages by any person who is injured in his 'business' or 'property' by reason of anything forbidden by the anti-trust laws. Defendants contend that since plaintiff never actually engaged in business, it had no business within the intendment of Section 4. Defendant's argument necessarily presupposes that when Congress authorized treble damage suits it meant to distinguish between the rights of persons who are put out of business and the rights of persons who are kept out of business by a conspiracy. It is unreasonable to suppose that such a distinction was intended by Congress. The purpose of the anti-trust laws is to promote competition and to prevent its restraint. *This purpose is no less thwarted when a person who intends and is prepared to embark in trade is stopped at the outset, than it is when a going business is brought to a standstill. It is as unlawful to prevent a person from engaging in business as it is to drive him out of business. Thomsen v. Union Castle Mail SS. Co.*, 2 Cir., 1908, 166 F. 251, 253. The restriction which defendants would place upon the meaning of the word 'business' is unwarranted in the context of its Clayton Act usage." (Emphasis supplied.)

Respondents proceed to compound their error by arguing that the ruling of this Court in *Klor's* does not mean what it says. Both briefs proceed upon the factually erroneous premise that "the substitution of one distributor for another in a competitive market is not a restraint of trade under the Sherman Act where it does not affect competition." (Stroh Brief at 11.) The Kohn Brief is bolder (Kohn Brief at 14):

"It seems to be petitioner's position that a Sherman Act violation is stated any time that there is alleged 'destruction of the trader's business capability by conspiracy.' (Petition, p. 11). In other words, petitioner would expand the coverage of Section 1 of the Sherman Act to include common law torts against business entities, even in the absence of any effect upon competition in the market or any other effect upon market conditions. *No court has ever interpreted the Sherman Act as meaning what petitioner now says it means.*" (Emphasis supplied.)

Respondents misstate the law. In *Dovberg vs. Dow Chemical Company*, 195 F. Supp. 337 (E. D. Penna. 1963), decided by Senior District Judge Leahy, defendants moved for summary judgment upon a complaint that the defendants conspired to destroy plaintiff's business and thereby to preserve one defendant's dominant position in the wet paste manufacturing business in the Pennsylvania area, and Dow's control of the principal ingredients of plaintiff's cellulose paste. There, as here, the argument was made that the pleader had failed to allege the requisite impact upon interstate commerce within the meaning of the anti-trust laws.

In overruling the contention, Judge Leahy stated at 195 F. Supp. 344:

"The rule, however, of 'effect upon interstate commerce' laid down in *Klor's Inc. v. Broadway-Hale Stores*, 359 U. S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741, and *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. et al.*, 364 U. S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358, is very broad. The Supreme Court has stated the rule to encompass any situation where the use of economic leverage through *group* boycott or *efforts* has been used to limit or close an individual entrepreneur's access to supply or disposition of goods in interstate commerce, or used to foreclose market entry or market

operations *regardless of the perceptible market effect.*" (Emphasis supplied.)

Respondents further proceed to compound their error by arguing that there was no *group effort* or *group conspiracy* to destroy petitioner's business. As apparent from the allegations in the Complaint however, the conspiracy in the case at bar proceeded at three levels:

a. The brewer and its agents;

b. Kohn Corporations and personnel other than the new distributor; and

c. The managerial inside persomel of petitioner.

Just as in the *Poller* case, the conspiracy was achieved between the "refuser to deal" and the efforts of independent outside persons and entities other than the new distributor. Hence, the distinction is clear between the case at bar and the suggestion of this Court in *Klor's*:

> "This is not a case of a single trade refusing to deal with another, nor even of a manufacturer and dealer agreeing to an exclusive distributorship." (359 U. S. at 212.)

Obviously, far more than the "normal substitution" of a distributorship occurred.

Respondents' argument thus boils down to the following:

By the mere denial and limitation of the allegations of a Complaint, anti-trust defendants may circumvent the principles of *Klor's vs. Broadway-Hale Stores*, 359 U. S. 207 and *Radiant Burners, Inc., vs. Peoples Gas Light & Coke Co.*, 364 U. S. 656, that *group efforts* to foreclose market entry or market operations in commerce are actionable.

While both Respondents protest to this Court that they are not seeking to resurrect the "public injury" re-

quirement for private anti-trust action, their arguments urge precisely this defense. Such arguments were surely consigned to oblivion by this Court in *Klor's*, when it held that the combination therein stated "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

The availability of other products or services, and the availability of other competitors in the market have been repeatedly urged upon this Court—notably in *Klor's* and *Poller*—in mitigation of the anti-trust consequences of the destruction of a competitor. Precisely the same reasons are again urged upon this Court. This time, however, the argument is cloaked under the phrase "no effect upon competition." Obviously, Respondents' argument is again "no public injury."

III.

THE COMMON LAW CONSPIRACY TO DESTROY PETITIONER'S BUSINESS SERVES TO UNDERSCORE, NOT TO CONDONE, THE ANTITRUST VIOLATION.

The briefs of both Respondents urge upon the Court that the presence of possible liability for common law tort serves to dissipate the Sherman Act liability. The Stroh Brief departs from the record in the case to show that petitioner is aware of the Respondents' possible common law liability.

The fallacy of Respondents' argument is transparent. Antitrust violations may be accomplished by a conspiracy or combination consisting of individual acts, each of which, considered separately and apart from the conspiracy or combination, would otherwise be proper. The antitrust violation may also be accomplished by a conspiracy or combination, every step of which is tortious. *A. P. Manage-*

ment Corp. v. Young & Rubicam, Inc., 1962 Trade Cases, Par. 70,254 (S. D. N. Y., 1962). A boycott, for example, is actionable both at common law and under the antitrust laws. It does not follow, however, that the antitrust claimant in *Klor's, Inc.*, could be remanded solely to his common law remedy.

Where the facts of an antitrust case also exhibit the characteristics of common law tort, invariably defendants have urged that only the tort, not the violation of federal law, is before the Court. And almost invariably the argument has been rejected. Most recently, in *North Texas Producers Association v. Young*, 308 F. 2d 235 (C. A. 5, 1962) *cert. den.*, 83 Sup. Ct. 874 (1963) the antitrust conspiracy to prevent the plaintiff from competing in business was accomplished by means of a conspiratorial inducement of a breach of contract.

There, as here, the argument is made that plaintiff's only remedy was in common law tort. As the Court of Appeals stated (308 F. 2d at 238):

> "The thrust of the argument of North Texas on this appeal is not aimed at the existence vel non of a conspiracy, but strongly asserts that *Young did not state a cause of action under the antitrust laws and suggests an action for simple breach of contract.*" (Emphasis supplied.)

The Court of Appeals overruled the contention, pointing out the "myriad of situations demonstrating ingenuity, disguise, intrigue and subterfuge to avoid the appearance of law violation."

In its holding, the Court relied upon the right of the businessman to be free from conspiracy designed to prevent his engaging in business (308 F. 2d at 243):

> "Keith Young was guilty of no lethargy or speculative assertion of a mere wish, desire or intention to engage

> in business. In July he bound himself by the terms of a contract, which the evidence indicates would have been in performance in December. *The alleged conspiracy stopped him cold in November.*" (Emphasis supplied.)

Petitioner seeks only the opportunity to make its proof that Respondents' conspiracies "stopped cold" a viable business in commerce.

Respondents' attempt to "disjoint" the facts. They argue that Stroh had the right to refuse to deal; and that the refusal to deal occurred simply in the context of a common law tort.

Respondents would have this Court overlook the proposition that a refusal to deal in the context of an alleged conspiracy or combination to destroy a competitor in commerce may not be "segmented." As *Poller* held, the refusal to deal is merely a step in the alleged wrongful conspiracy.

CONCLUSION.

Respondents' briefs mirror the basic errors of the rulings of the Courts below. These rulings are conceived in a denial of and a restrictive interpretation of the allegations of the Complaint.

The conspiracy alleged is construed by Respondents as one which does not set forth "a separate and further intent or natural consequence of causing one of those market effects which constitute an unreasonable restraint of trade under the Sherman Act. And Ace's Complaint shows that no such intent or consequence was present here." (Kohn Brief, 17 to 18.)

Respondents' position boils down to the simple proposition that a predatory combination to destroy the competitor in commerce, and thereby to divert the free flow of commerce into a local market, is nonactionable under

the antitrust laws. Until the rulings by the Courts below, it was not the common understanding that the invitation to freedom of competition afforded by the antitrust laws, was also an invitation to combine and conspire to destroy the competitor in commerce.

Respectfully submitted,

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